No. 91-833

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL, ROYSPEC,

Petitioners,

v.

SCOTT NELSON and VIVIAN NELSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether claims of false imprisonment, battery, negligence and derivative injury—founded directly upon the recruitment and employment practices and the wrongful disciplinary actions of a hospital enterprise and its foreign state owner—are "based upon" activities of a "commercial" nature for purposes of establishing U.S. jurisdiction under the Foreign Sovereign Immunities Act.

2. Whether the activities of a hospital employer in staffing its overseas facility through extensive recruitment and hiring in the United States, transacting in the United States for the services of a United States citizen, and wrongfully retaliating against him for performing those services, are activities having "substantial contact with the United States" for purposes of establishing U.S. jurisdiction under the Foreign Sovereign Immunities Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-522

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL, ROYSPEC,

Petitioners,

v.

SCOTT NELSON and VIVIAN NELSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENTS

Respondents Scott Nelson and Vivian Nelson (plaintiff-appellants below) request that this Court affirm the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinions below are adequately set forth in the Brief for the Petitioners.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Brief for the Petitioners.

STATUTES INVOLVED

This case involves the Foreign Sovereign Immunities Act of 1976 ("FSIA" or "Act"), 28 U.S.C. § 1602 *et seq.* Pertinent provisions of the FSIA are set forth in the attached Statutory Appendix.

STATEMENT OF THE CASE

Introduction. The King Faisal Specialist Hospital and Research Center, its agent Royspec Purchasing Services, and its owner, the Kingdom of Saudi Arabia, (defendant-appellees below) seek to reverse an appeals court decision that the federal courts are competent, under the Foreign Sovereign Immunities Act, to adjudicate the Nelsons' claims against them. Those claims, for personal injury, arise out of the Hospital's commercial dealings in the United States and related activities in Saudi Arabia. In particular, they are based upon the Hospital's employment practices —*i.e.*, its recruitment and engagement of Scott Nelson in the United States to assume certain responsibilities as a systems engineer at the Hospital's facility in Riyadh, and the wrongful "disciplinary" actions taken against him by the Hospital for performance of those responsibilities. In retaliation for Mr. Nelson's persistent efforts in accordance with his job responsibilities to correct a serious health and safety hazard in the Hospital's mechanical systems, the Hospital wrongly caused him to be imprisoned, detained under inhumane conditions, and tortured. The issue is whether the court of appeals correctly held that the Nelsons' suit is based upon commercial activity having substantial contact with the United States, thereby putting the matter within the jurisdiction of our courts under clause 1 of section 1605(a)(2) of the FSIA.

The Parties. Respondent Scott J. Nelson ("Nelson") was born on April 5, 1954 in Boston, Massachusetts and is a citizen of the United States. Respondent Vivian Nelson, his spouse, is also a U.S. citizen. Petitioners are the King Faisal Specialist Hospital and Research Center (the "Hospital"), Royspec Purchasing Services ("Royspec"), and the Kingdom of Saudi Arabia. The Hospital is a health care enterprise that provides a variety of medical services. It has medical, administrative, housing and other facilities in Riyadh. Royspec serves as an agent of the Hospital in the United States for

purchasing and other purposes. It maintains an office in Harmans, Maryland. The Kingdom of Saudi Arabia ("Saudi Arabia" or "Owner") owns and controls both the Hospital and Royspec. It is not disputed that Saudi Arabia is a "foreign state" and that the Hospital and Royspec are an "agency or instrumentality of a foreign state" as defined in the FSIA. 28 U.S.C. § 1603(a), (b).

The Jurisdictional Facts.[1] In August 1973, while the Hospital was still under construction, Saudi Arabia and the Hospital entered into a multi-million dollar contract with the Hospital Corporation of America ("HCA"), a Tennessee corporation that operates numerous for-profit hospitals in the United States. (Joint Appendix [hereinafter "J.A."] 70-84) Under the contract, HCA agreed to "act for" Saudi Arabia as "Owner" in "assum[ing] complete management responsibility for operations of the Hospital." (J.A. 72) This included, among many other matters, "overall responsibility" for recruiting the staff "required to open and operate the Hospital." (*Id.*) In particular, HCA "as agent" undertook to "recruit and employ administrative, nursing, technical, maintenance and all other personnel." (J.A. 72-73) The agreement contemplated recruitment activities by HCA "worldwide," including in the United States, to engage "expatriate personnel" on behalf of Saudi Arabia and the Hospital. (J.A. 72, 82)

Under the contract, Owner asserted its "ultimate authority for the operation of the Hospital." (J.A. 76) The contract specifically required that Owner "approve" HCA's

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[1] This case involves a facial challenge to subject matter jurisdiction. As they did in the district court and the court of appeals, Petitioners invite this Court to entertain certain factual issues in sharp dispute between the parties. These issues were properly disregarded by both the courts below. *See infra* at 11-13. To facilitate the Court's consideration of the jurisdictional issues, Respondents confine their discussion of these disputed facts to the footnotes.

"standard form employment contract * * * in order to assure that such contract adequately sets forth the conditions of employment of the Hospital deemed necessary by Owner." (J.A. 72) According to the contract, "[a]ll such employment contracts will be between Owner and the employee, but may be executed for Owner by HCA." (*Id.*) The contract also provided that Owner shall "select the candidates to be employed and shall set their salary and other remuneration." (J.A. 73)

The initial term of the contract was seven years, through August 31, 1980, and Saudi Arabia, the Hospital and HCA amended and extended the contract periodically. (J.A. 76, 85-89) In 1979, Royspec assumed responsibility for purchasing functions in the United States previously handled for the Hospital by HCA. Under contract with the Hospital, however, HCA continued to have "exclusive responsibility for recruiting" all expatriate personnel from the United States through at least 1989. (J.A. 23, 30)

In 1983, as part of this ongoing recruitment program carried on in the United States, HCA announced an opening in the Hospital's engineering/utilities maintenance department for a "monitoring systems engineer." (J.A. 13, 17, 25) Its advertisement in the September 8, 1983 issue of *Engineering News-Record* described a "passport to international opportunities" with the Hospital, at a "beautifully landscaped medical city located in the heart of the Kingdom."[2] The advertisement stated, "Persons interested in this position will be employed by, have a contract with, and work directly for the Government of the Kingdom of Saudi Arabia." "For further information and/or to apply" for the job, such persons were directed to contact HCA in Nashville, Tennessee. (J.A. 25)

[2] *Engineering News-Record* is published by McGraw-Hill Publications Co. in New York City. In 1983, it had a weekly circulation of 106,000 copies. *See* ULRICH'S INT'L PERIODICALS DIRECTORY 529 (22d ed. 1983).

While in the United States, Nelson saw the advertisement. Subsequently, he interviewed for the job in Saudi Arabia. Following the interview, on October 23, 1983, the Hospital (or Royspec on its behalf) telexed HCA in Nashville to notify it of the Hospital's approval for HCA to hire Nelson. For purposes of follow-up by HCA, the message also confirmed Nelson's Florida address and the date of his return to the United States. (J.A. 28) During November 1983, HCA recruited him to fill the position. (J.A. 4)

On November 29, 1983, in Miami, Nelson signed a two-year employment agreement with the Hospital. (J.A. 4, 13, 17, 40-47) The agreement likewise was signed in the United States by an official of HCA "as agent," acting in accordance with its contract on the Owner's and the Hospital's behalf. (J.A. 47) Under the agreement, Nelson accepted the job of monitoring systems engineer. (J.A. 40) The Hospital defined his "principal duties" to include maintaining Hospital systems in "compliance with safety regulations," "[t]roubleshoot[ing] problems and implement[ing] corrective action." (J.A. 26-27) His assigned function was "to inspect and monitor all hospital facilities, equipment, utilities, and maintenance systems to insure the safety of patients, hospital staff and others." (J.A. 4, 13, 17) Prior to his departure for Saudi Arabia on December 7, 1983,[3] Nelson completed various application, processing and medical screening requirements in the United States and travelled to Nashville for a Hospital employee "orientation" program. (J.A. 13, 33, 57) At this program, HCA identified Royspec in Maryland as the U.S. point of contact for family members that might wish to contact the Nelson family in Saudi Arabia in the event of any emergency. (J.A. 33, 96)

[3] The contract required that Nelson surrender his and his family's passports to the Hospital for the duration of their stay in Saudi Arabia. It also stated that this would "not in any way restrict [Nelson's] ability to obtain the passport whenever it is deemed necessary." (J.A. 41-42, 46)

During the ninety-day probationary period specified in the contract and thereafter, Nelson performed his duties at the Hospital "without incident."[4] (Brief for Petitioners [hereinafter "Pet. Br."] at 4) On or about March 20, 1984, in the course of his work, he identified certain "safety hazards" at the Hospital. (J.A. 4, 13, 18) These hazards were posed by "grease valve[s]" (as opposed to sterilized valves) "in the oxygen and nitrous oxide lines at the * * * Hospital." (J.A. 52, 102) "These [valves] were not only a fire hazard, but were endangering patients [sic] lives in that all lines that connected to these valves were contaminated."[5] (J.A. 57) During the period from March 20 through August 1984, Nelson "repeatedly reported" these "safety hazards" to hospital officials. (J.A. 4-5, 13, 18) Rather than authorizing Nelson to take appropriate corrective measures, Hospital officials repeatedly instructed him to ignore the problem. (J.A. 58) In due course, Nelson also reported his discovery to a Saudi Royal Commission that was investigating the Hospital. (J.A. 4-5, 13, 18, 58)

In the face of continuing harassment from Hospital authorities, Nelson offered and requested to resign his position and depart Saudi Arabia in June and September 1984. (J.A. 58) The Hospital, however, declined to

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[4] His job performance merited a June 13, 1984 "Letter of Appreciation" from his supervisor who noted Nelson's "ability to successfully and efficiently carry out * * * job * * * functions" as well as his "devotion, professionalism and concern" for the Hospital. (Pls.' Ex. 5, R. 29) Subsequently, Nelson's supervisor recommended that Nelson be promoted, stating that his "experience and knowledge * * * would be most difficult to replace." (Pls.' Ex. 6, R. 29)

[5] At approximately the time Nelson discovered this situation, the Hospital staff had apparently identified an unusual incidence of "problems with patients expiring due to respiratory failures for simple-type procedures." Relating these problems to the contaminants introduced in the lines by the grease valves, Nelson naturally had concerns about his professional and personal accountability should the situation not be corrected. (J.A. 63)

accept his resignation, thereby requiring Nelson to remain in Saudi Arabia against his will. (J.A. 5, 58) On September 27, 1984, as a "direct and proximate result of these actions" in bringing to light these safety hazards, employees of the Hospital summoned Nelson to the Hospital's security office, from which he was taken to a cell in a detention facility. (J.A. 5, 14, 18, 58) There, persons "acting at the direction, instigation, provocation, instruction or request" of the Hospital, Royspec (its agent), and/or Saudi Arabia (its Owner) proceeded to "shackle[], torture[] and beat[]" Nelson. (J.A. 5, 14, 18, 58-59) So serious were Nelson's injuries that from the date they were first inflicted, the first date of his detention, he has been adjudged to be permanently and totally disabled.[6]

For the next four days, Nelson was kept in solitary confinement in a small cell and deprived of food. On October 1, Nelson was taken to an office where he was met by an interpreter whom he recognized to be a Hospital employee. This employee instructed Nelson to "sign anything they ask" and warned him that otherwise the beatings would continue. Nelson signed an Arabic language statement, the nature of which was and still is unknown to him. Two days later, on October 3, Nelson was transferred to a Saudi prison.[7] (J.A. 59-60)

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[6] Respondents have lodged with the Court a copy of the decision rendered by Administrative Law Judge David D. Tennant, following an evidentiary hearing on Nelson's application to the Social Security Administration for disability insurance benefits. The case concerned his claim of inability to work "because of the residual effects of being tortured while held as a prisoner in Saudi Arabia." The decision upheld Nelson's claim for disability as of September 27, 1984. *See In the Case of Scott J. Nelson*, No. 015-42-6023 (Dep't of Health and Human Services, Office of Hearings and Appeals, Sept. 14, 1990).

[7] From October 3 onward, Nelson was held in a large overcrowded cell. He was forced to sleep on the floor of the cell where rats crawled over him throughout the night. The lights glared twenty-four hours a day. Meals were served on a single large tray and, as prisoners grabbed the food directly from the tray with their hands,

During the first several days of his confinement, Nelson was held incommunicado and his family was not informed of his whereabouts. After Mrs. Nelson finally was advised of her husband's situation, a Saudi official made a suggestion to her that he could arrange for her husband's release in exchange for "sexual favors." (J.A. 5, 56)

On November 5, 1984, Nelson finally was released from prison. (J.A. 5, 60) During his 39 days of detention, no Hospital or Saudi government official ever advised him or Mrs. Nelson of the reasons he was taken and held, nor was Nelson charged with any offense. (J.A. 5, 56, 60) He was not brought before any committing magistrate, examining court or similar authority, nor was he made the subject of a preliminary hearing or any other ostensible legal process. (*Id.*) After Nelson's release, officials of the Hospital in fact urged him to resume his duties and, by withholding passports and exit visas, required Nelson and his family to remain in Saudi Arabia for seven more days, in the hope he would choose to do so. (J.A. 60-61) On November 12, 1984, Nelson and his family at last were allowed to leave the country. (J.A. 5, 61) Returning to Florida "to seek medical help," Nelson began a course of surgery and intensive physical therapy. (J.A. 61)

Petitioners concede, as they must, that the allegations in the complaint are to be taken as true for purposes of their "facial challenge to jurisdiction." (Pet. Br. at 3 n.3) They nonetheless deny that the complaint and other materials of record (which principally consist of exhibits to Petitioners' own motion papers in the district court) are "accurate or complete" with respect to the circumstances of Nelson's detention. (*Id.*) In particular, "Saudi Arabia has consistently maintained that Respondent was

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Nelson felt fortunate for the times he was able to secure a handful for himself. He was allowed outside the cell only once a week for fresh air and exercise. Prisoners due to be lashed were removed from the cell area daily and beaten so that all could watch. (J.A. 59-60)

arrested because of his misrepresentations and forgery." (Pet. Br. at 4-5) Nelson acknowledges, as he has done since 1984, that after completing his employment application, he misrepresented to HCA that he received a college degree. (J.A. 35-39) Petitioners have produced nothing, however, to support their claim that these acts did or could provide the occasion for Nelson's detention.[8] The record does not support their claim,[9] and in fact

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[8] Petitioners have produced not a shred of documentary or other evidence reflecting Saudi law enforcement or judicial procedures directed against Nelson whether relating to an official investigation or to an arrest, interrogation, detention, arraignment, conviction, punishment or discharge. Almost eight years after Nelson's detention, Petitioners' U.S. counsel now cite provisions of a ministerial resolution and royal decree, and would have the Court infer that these provisions criminalize the conduct to which Nelson has admitted—i.e., misrepresenting his educational credentials to HCA in the United States. (Pet. Br. at 5 n.6) Petitioners' U.S. counsel do not state that Nelson was arrested, held or charged under these provisions.

[9] The material in the record on which Petitioners do rely has no evidentiary value. It consists of one sentence in a two-paragraph State Department "report" which states, "On September 24, 1984, [sic] Nelson was arrested for having presented Saudi officials with a fraudulent college degree * * *." (J.A. 64) Submitted in response to a question at a 1987 Congressional hearing, the "report" sought to explain why the Department had not protested the maltreatment of Nelson and three other U.S. citizens. (J.A. 51, 63-65) Oral testimony offered by John Adams, the Director of the State Department's Citizens Emergency Center, corroborates Nelson's account (and flatly contradicts the "report"). Asked whether, having "studied these cases," he doubted the "veracity" of Nelson or the other witnesses, Mr. Adams replied "for the record": "No, there is no doubt in my mind * * * I don't challenge their veracity, no." (J.A. 66; *see also* J.A. 65-66 (testimony of Marion V. Creekmore, Deputy Assistant Secretary, Bureau of Near Eastern and South Asian Affairs, Department of State))

Asked during this same hearing whether he had been charged with any crime in Saudi Arabia, Nelson affirmed that there was "never any charge of wrongdoing" or accusation of a "crime of any kind" made against him. (J.A. 62) Petitioners suggest that these replies were untruthful. (Pet. Br. at 6 n.8) Nonetheless, in eight years they have produced nothing to substantiate their claim that any criminal charge or accusation in fact was made against him.

contains numerous indications to the contrary.[10] Petitioners, in any event, do not suggest that these actions might explain or justify the battery and severe physical injuries of which Nelson complains. (J.A. 15-16)

The Complaint. In 1988, Respondents brought this action for damages in federal court. Their complaint names the Hospital and Royspec, each of which is alleged to be "a separate legal person and an agent, instrumentality and alter ego of * * * Saudia Arabia." (J.A. 13, 17) It also names Saudi Arabia directly, as a "foreign state which does maintain and run the * * * Hospital * * * and which conducts through * * * Royspec (and other agents), business activities in the United States" for the Hospital. (J.A. 4)

The complaint states sixteen causes of action or "Counts," including "tortious acts or omissions and willful and overt violations of international law." (J.A. 11) The core of the complaint, Counts IX through XII, concerns torts by the Hospital. Count IX ("negligence") alleges breach by the Hospital (as Nelson's "recruiter and/or employer") of its duty to exercise due care to prevent Nelson's injury. It asserts, in particular, that at the time the Hospital recruited Nelson, at the time he began work, and at the time he reported the safety hazards, the Hospital breached a duty to warn and in-

[10] The internal "Note" authored by the Hospital's Legal Advisor, cited by Petitioners (Pet. Br. at 4 n.5) and made part of the record below, states that HCA and the Hospital had reason to know about the diploma prior to July 12, 1984—two and a half months before Nelson was first detained. The "Note" states that if Nelson were unable to rebut this accusation, the Hospital should terminate Nelson's employment in accordance with the "Disciplinary Procedures" specified in his contract. (J.A. 43-44) While the Legal Advisor's "Note" suggests no possibility of, or even any grounds for, Nelson's arrest or prosecution, it does allude to the "information" provided by Nelson to the Royal Commission and the "conflict which is being settled by the Royal Commission, which is specially formed to investigate the Hospital's conditions * * *." (Pls.' Ex. 4, R. 29)

struct him of dangers associated with his employment. In this Count, the complaint charges, *inter alia*, that the Hospital "knew or should have known that officials of the Saudi Government, and officials of Saudi institutions such as [the Hospital], have, and sometimes exercise, the power to have persons summarily arrested, detained, and physically abused, without legal cause." It also asserts that the Hospital "knew or should have known" that Nelson risked "severe retaliatory action" in the event he sought to remedy or disclose health-related or other hazards at the Hospital. Count X ("battery") states that the Hospital, acting "by and through its agents or employees," intentionally and unlawfully struck and assaulted Nelson. Count XI ("false imprisonment") recites in similar terms that the Hospital deprived Nelson of "his liberty without * * * legal justification." In Count XII ("derivative claim"), Mrs. Nelson asserts loss of support and other injuries as a result of the Hospital's "tortious acts or omissions."

Counts XIII through XVI of the complaint restate the foregoing allegations in virtually identical terms against Royspec.

The remaining eight counts of the complaint concern Saudi Arabia. Counts I ("negligence"), II ("battery") and VIII ("derivative claim") restate as to Saudi Arabia the allegations elsewhere made against the Hospital and Royspec. Finally, Counts III ("unlawful detainment"), IV ("wrongful arrest and imprisonment"), V ("inhuman torture"), VI ("disruption of normal family life"), and VII ("mental anguish") allege the breach by Saudi Arabia of numerous provisions of international law.

The Opinion of the District Court. On August 11, 1989, the United States District Court for the Southern District of Florida dismissed Respondents' complaint for lack of subject matter jurisdiction under the FSIA. (J.A. 91-98) Because Respondents' motion to dismiss was a facial challenge to jurisdiction, the court held no evidentiary hearing and did not purport to resolve any

factual issues related to the asserted basis of jurisdiction.[11] It held that clause 1 of the commercial activities exception of the FSIA—providing jurisdiction "in any case in which the action is based upon a commercial activity" of a foreign state that has "substantial contact with the United States"—did not apply to the complaint against the Hospital and Saudia Arabia for two reasons. (J.A. 93) The court held that neither the recruitment activities by the Hospital and Saudi Arabia in the United States nor the execution of an employment contract with Nelson in the United States would "qualify as substantial contact." (J.A. 95) The court also held that even if the commercial activities of the Hospital and Saudi Arabia did have substantial contact with the United States, the "nexus" between the causes of action alleged and those commercial activities was "too tenuous to support jurisdiction over a foreign sovereign." (J.A. 96-97) Similarly, with respect to the claims against Royspec, the court found that, although Royspec "carries on commercial activities in this country," there was "no nexus between Royspec's business and the torts alleged" in the complaint. (J.A. 94, 96)

The Decision of the Court of Appeals. The United States Court of Appeals for the Eleventh Circuit unanimously reversed the decision of the district court. It held that clause 1 of the commercial activities exception confers subject matter jurisdiction under the FSIA. (J.A.

[11] In their Memorandum In Support Of The Motion To Dismiss The Complaint, the Hospital and Saudi Arabia observed that "[a]n inquiry into the underlying acts and motivations of the Saudi police, however, need not and should not be undertaken by this court. The complaint can and should be dismissed in its entirety even if the court assumes that the plaintiffs' allegations are true." (R. 71) While Petitioners nonetheless pressed their claim that Nelson was detained following the government's discovery that he had misrepresented his credentials, rather than in retaliation for reporting safety violations, the district court found that "those disputed facts are not relevant to the motions to dismiss." (J.A. 92 n.1)

101) Accepting the allegations in the complaint as true for purposes of resolving the appeal, including the allegation that the three Petitioners are alter egos of one another, the Eleventh Circuit drew no distinctions among the Hospital, its agent and its owner, but referred to Petitioners "collectively" as "Saudi Arabia." (J.A. 100)

In reaching its decision, the appeals court first concluded that "[o]n the facts presented * * * the recruitment and hiring [of Nelson] in the United States constituted a 'commercial actvity' " that the Petitioners had carried on here. (J.A. 109). The court further found that their retaliatory actions against Nelson[12] "resulted from and were directly attributable to [his] employment," the duties of which included "detecting and reporting safety violations at the Hospital." (J.A. 113) Accordingly, the court concluded that "the detention and torture of Nelson are so intertwined with his employment at the Hospital that they are 'based upon' his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia." (*Id.*)

Following the decision of the court of appeals, Petitioners requested rehearing and suggested rehearing *en banc*. In a decision dated July 1, 1991, the Eleventh Circuit denied this request. (J.A. 133) This Court granted the petition for certiorari on June 8, 1992.

[12] Petitioners likewise argued in the court of appeals that "the actions taken against Nelson were the result of Nelson's submission of a false diploma * * *." (J.A. 114) Without seeking to resolve the question, the court observed that "this argument * * * in effect admits the nexus between Nelson's recruitment in Florida and his detention and torture in Saudi Arabia, and supports Nelson's claim of subject matter jurisdiction." (*Id.*)

SUMMARY OF THE ARGUMENT

The Eleventh Circuit correctly held that the FSIA confers jurisdiction over Scott and Vivian Nelson's suit for intentional torts, negligence and derivative injury against the Hospital, its agent Royspec, and their owner Saudi Arabia.

Because the Nelsons complain of the commercial activities of a hospital enterprise that have substantial contact with the United States, their action is one properly subject to United States jurisdiction under clause 1 of section 1605(a)(2) of the FSIA. Under that clause, the FSIA directs that a foreign state shall not be immune in any case in which the action is based upon a particular act or transaction or a regular course of conduct carried on by such state, provided it is "commercial" in nature and has "substantial contact" with the United States.

Here, the Nelsons base their claims on inherently commercial activities of a hospital enterprise that have abundant contacts with the United States. Their action is based on the recruitment and employment of Hospital personnel regularly conducted by all the Petitioners, including Saudi Arabia by virtue of its extensive control of the enterprise. It is based upon Petitioners' particular transaction with Nelson, who was recruited and hired to troubleshoot health and safety hazards at the Hospital. It is equally based upon Petitioners' particular acts in causing Nelson to be falsely imprisoned, tortured and thereby severely injured in retaliation for doing his job, and upon the breach by Petitioners of their duty as an employer to prevent Nelson's injury and warn him of job-related dangers.

All of these activities have substantial contact with the United States. To staff the Hospital, Petitioners availed themselves regularly of the U.S. labor market. They used U.S. media to recruit an American citizen to identify and correct health and safety hazards at the Hospital. They entered here on an employment relationship with Nelson, securing his services for that purpose. Notwithstanding the affirmative duties necessarily implied

by that employment relationship, Petitioners subsequently retaliated against him for doing the job that they had recruited and hired him in the United States to do. These facts provide all the substantial U.S. contact required by clause 1 of the commercial activities exception for jurisdiction over the Nelsons' action.

For purposes of resolving Petitioners' facial challenge to subject matter jurisdiction, the allegations of the Nelsons' complaint are taken to be true and generously construed in their favor. Petitioners' attempt to establish their immunity, nonetheless, on the basis of disputed facts concerning a "sovereign law enforcement" nexus with Nelson's detention and torture. This they cannot do. It is in sharp dispute whether, months earlier in the United States, Nelson's admitted misrepresentation of his educational background could or did provide the occasion for any such law enforcement action in Saudi Arabia. The record does not support that hypothesis. Moreover, Petitioners provide no factual or legal basis for concluding that the alleged wrongful acts of the Hospital or Saudi Arabia as its Owner were subsumed into or derived immunity from law enforcement or any other sovereign activity.

Arbitrary detention and torture are universally condemned under international law, prohibited under Saudi law, and especially repugnant by their nature. Such acts should not be attributed to the exercise of sovereign police powers in order to shield a foreign state's commercial enterprise. Wrongful connivance by Saudi law enforcement personnel in the Hospital's retaliation against Nelson would not derogate from the amenability of the Hospital, or of Saudi Arabia as its Owner, to U.S. jurisdiction in an action such as this, which is based on their commercial activities having substantial contact with the United States. Assuming such connivance, any legitimate U.S. foreign policy interest implicated by the Nelsons' action is of concern not under the FSIA but only under the act of state doctrine, a question not addressed by the courts below and not properly presented here.

ARGUMENT

PETITIONERS ARE NOT ENTITLED TO IMMUNITY UNDER THE FSIA

The Nelsons allege that the Hospital, Saudi Arabia as its Owner, and Royspec as one of its U.S. agents, pursued prolonged and wide-ranging commercial activity in the United States relating to the operations and staffing of the Hospital, including the recruitment and engagement of Hospital personnel; that the concerted activity of these entities—particularly the Hospital and its Owner —in the United States led Nelson to become their employee and to take on certain employment responsibilities, which he properly performed; and, notwithstanding the duties assumed by them as Nelson's employer, that they or their agents and employees negligently failed to prevent, and/or in retaliation for the proper performance of his job, wrongly caused serious injury to Nelson and his wife. As the Eleventh Circuit found, these allegations support jurisdiction under clause 1 of section 1605(a)(2) of the FSIA. (J.A. 115)

This Court has held that the FSIA is "the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). The Act provides "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). Here, the Hospital and Royspec seek to establish the immunity of their activities as an "agency or instrumentality of a foreign state" by virtue of Saudi Arabia's ownership. The Nelsons assert jurisdiction over them and Saudi Arabia for the same activities under a provision of the FSIA's "commercial activities" exception. Equally as to Saudi Arabia (in its capacity as Owner) and as to the Hospital and Royspec (in their capacity as

its agents), they assert liability for battery and false imprisonment, for negligence, and for derivative injury.

These claims against Saudi Arabia are based upon the fact that the Hospital and Royspec as "corporate entit[ies are] so extensively controlled by" their Owner "that a relationship of principal and agent is created." *First Nat'l City Bank v. Banco Para el Commercio Exterior de Cuba*, 562 U.S. 611, 629 (1983). The record admits no construction on which "equitable principles" might sustain the normal presumption that the Hospital has an independent status. *Id.* at 627-28. The Hospital is Saudi Arabia's creature: in the HCA contract, Saudi Arabia made it plain that "the ultimate authority for the operation of the Hospital is Owner" and that "Owner" intended to exercise such authority over the details of that operation. (J.A. 76) Nelson was Saudi Arabia's employee no less than the Hospital's: the advertisement that Nelson saw and to which he responded in the United States stated that the monitoring systems engineer would "be employed by, have a contract with, and work directly for the Government of the Kingdom of Saudi Arabia." (J.A. 25)

Indeed, for all purposes relevant to the Hospital enterprise, and certainly all those that bear on disposition of Petitioners' motion to dismiss, the Hospital and its Owner are one and the same. They are literally, as the Nelsons have alleged, "alter egos." (J.A. 17) The Eleventh Circuit accepted this allegation for purposes of its jurisdictional analysis. As to the Hospital,[13] the Petitioners have

[13] As noted, the complaint specifically alleges that Royspec is the agent and alter ego of Saudi Arabia and the Hospital. (J.A. 17) Petitioners' own witnesses describe Royspec as having been "created" by the Hospital to "assume responsibility for the [Hospital's] purchasing function in the United States." (J.A. 31) HCA identified Royspec as the point of contact for persons wishing to communicate with the Nelson family in Saudi Arabia. (J.A. 33, 96) The Eleventh Circuit also noted "that four telegrams, all of which acknowledge Nelson's employment, contain the telex designation

never challenged it. In view of Saudi Arabia's ownership and control, Petitioners assert broad immunity from the jurisdiction of our courts, pursuant to section 1604 of the FSIA, for what they characterize as exclusively sovereign or governmental conduct in Saudi Arabia—and what the Nelsons in their complaint correctly maintain was commercial activity having substantial U.S. contacts.

A. The FSIA Confers Jurisdiction Over Actions Based Upon Commercial Activities of Foreign States That Have Substantial U.S. Contact

Section 1330(a) of the FSIA strips foreign states of their jurisdictional immunity with respect to specific types of conduct described in sections 1605 to 1607. The most important of these is the "commercial activities" exception set forth in section 1605(a)(2) as follows:

> (a) A foreign state *shall not be immune* from the jurisdiction of courts of the United States or of the States *in any case*—
>
> * * * *
>
> (2) *in which the action is based* [1.], *upon a commercial activity carried on in the United States by the foreign state;* or [2.] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3.] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

(Emphasis added.) Section 1603(e) of the FSIA defines "commercial activity carried on in the United States by a

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'ROSPEC,' which, according to Nelson, may be the designation for Royspec." (J.A. 114) Accordingly, on the same rationale applied as to the Hospital and its Owner, the Eleventh Circuit was correct in holding that "on the record" before it, "Royspec is within the subject matter jurisdiction" of the U.S. courts under the FSIA. (*Id.*)

foreign state," a phrase that appears *only* in clause 1 of section 1605(a)(2), to mean "commercial activity carried on by such state and having substantial contact with the United States." Section 1603(d) provides that such "commercial activity" may consist either of "a regular course of commercial conduct or a particular commercial transaction or act." Under section 1603(e), a court seeking to determine whether a given activity has the requisite "commercial character" must refer "to the nature of the course of conduct or particular transaction or act," and not "to its purpose."

Clause 1 of section 1605(a)(2) and the Act's definitions in section 1603(d) and (e) work in tandem to establish U.S. jurisdiction "in any case in which the action is based upon" a "regular course of commercial conduct or a particular commercial transaction or act" "carried on by [a foreign] state and having substantial contact with the United States." Thus, the plain language dictates that U.S. jurisdiction over a foreign state's activity hinges upon a two-step inquiry. It must be determined first, whether the action is "based upon" a "regular course of * * * conduct or a particular * * * transaction or act" that is "commercial" in nature; and second, whether the course of conduct, transaction or act has "substantial contact with the United States." *See, e.g., Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1107 (5th Cir. 1985).

The commercial activities exception lies at the heart of the FSIA. Paralleling the two-part inquiry required by clause 1 of the Act, two broad purposes are apparent in the legislative history. First, this exception "largely codifies the so-called 'restrictive' theory of foreign sovereign immunity first endorsed by the State Department in 1952," *Republic of Argentina v. Weltover, Inc.*, 112 S.Ct. 2160, 2165 (1992), thus limiting by its *type* the conduct for which a foreign state may be held accountable; and second, it requires "some form of substantial

contact with the United States," *Verlinden*, 461 U.S. at 490, thus limiting by aspects of its *locale* the activity for which a foreign state may be held accountable in our courts.

As to the type of conduct, Congress found and declared in the FSIA that "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned." 28 U.S.C. § 1602. The Act reflects Congress' solicitude for the "rights of both foreign states *and* litigants in United States courts." *Id.* (emphasis added). Its history takes note of, among other things, "the growing number of disputes" between American citizens and foreign states and "expresses the desire to ensure" that "our citizens will have access to the courts in order to resolve ordinary legal disputes." *Verlinden*, 461 U.S. at 490 (citing H.R. REP. No. 1487, 94th Cong., 2d Sess. 6-7 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6604-06 [hereinafter "House Report"]).[14] Accordingly, the Act ensures that "the immunity of a foreign state is 'restricted' to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis)." House Report at 7.

As noted above, the FSIA also "prescribe[s] the necessary contacts" with the United States that "must exist before our courts can exercise" jurisdiction under the Act. *Id.* at 13. Here, the Act's substantive and pro-

[14] In his statement on signing the FSIA into law, President Ford stated:

> This statute will also make it easier for our citizens and foreign governments to turn to the courts to resolve ordinary legal disputes. In this respect, the Foreign Sovereign Immunities Act carries forward a modern and enlightened trend in international law. And it makes this development in the law available to all American citizens.

12 *Weekly Compilation of Presidential Documents* 1554 (Oct. 22, 1976).

cedural standards were intended not only to address the due process requirements of "minimum jurisdictional contacts and adequate notice." *Id.* By requiring that a commercial activity has some significant connection with the United States, Congress likewise "protected against th[e] danger" posed by opening our courts " 'to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world.' " *Verlinden*, 461 U.S. at 490 (quoting *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 31 (1976) [hereinafter "*Hearings on H.R. 11315*"] (testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division, Department of Justice)).

Applying these standards, the Eleventh Circuit properly concluded that the district court is competent to hear the Nelsons' claims. The relevant facts as set forth in the complaint are deemed to be true and are to be generously construed in their favor absent any evidentiary hearing on subject matter jurisdiction.[15] As is shown

[15] *E.g., Scheuer v. Rhodes*, 416 U.S. 232, 236-37 (1974); *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 172 (1967); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982) (where it is "contended that a complaint simply fails to allege facts upon which subject matter jurisdiction can be based * * *, all the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural consideration as he would receive under a Rule 12(b)(6) consideration"). Thus, the district court's dismissal of the complaint on the basis of disputed factual allegations bearing upon the existence of subject matter jurisdiction without conducting an evidentiary hearing would have constituted plain error. *E.g., Colonial Pipeline Co. v. Collins*, 921 F.2d 1237, 1243 (11th Cir. 1991).

Under the FSIA, the "ultimate burden of proving immunity * * * rest[s] with the foreign state." House Report at 17. The foregoing rules are no less applicable where, as here, the foreign state

below, the various causes of action against the Hospital, its Owner, and its agent in the United States, are rooted in the employment practices of a hospital enterprise, transactions decidedly commercial in nature and having abundant contacts with the United States.

B. Nelson's Intentional Tort Claims Are Based Upon The Commercial Activities Of The Hospital

Petitioners take little note in their brief of the inherently commercial nature of the Hospital and of its employment practices, and the alleged battery, false imprisonment, and other wrongful conduct of the Hospital in its capacity as Nelson's employer. Instead of a case brought against a hospital and its owner, Petitioners would characterize the case as one brought against a police department. For this purpose, they try to put at issue the truth of numerous allegations in the complaint, and invite the Court to construe those allegations in the light least favorable to the Nelsons. This effort to recast the action necessarily fails, because it would require the Court to resolve disputed issues of fact. The proper focus is on the course of conduct, transactions or acts of the Hospital and its Owner as alleged in the complaint, rather than on the hypothesized actions and motives of an unspecified Saudi law enforcement agency. So focused, any sound analysis of clause 1 of section 1605 (a) (2) compels the conclusion that this action is "based upon" commercial activity.[16]

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seeks to meet that burden on a facial challenge to subject matter jurisdiction under the FSIA. *E.g., Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 706 (9th Cir. 1992); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 440 n.3 (D.C. Cir. 1990); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988).

[16] Petitioners assert that even if Nelson's claims are based upon commercial activity, the U.S. courts would still lack jurisdiction since the employment contract provides that "[i]n case of any dispute arising from this contract, the Saudi courts * * * *only* will have jurisdiction." (Pet. Br. at 8) The issue whether this provision is applicable to these claims was not passed upon by the courts below and is not properly before this Court. At any rate, the fact that an action in tort may be "based upon commercial activity" under a correct interpretation of the FSIA has no bearing upon whether, under a correct interpretation of a private contract, claims of a different nature might fall within an enforceable forum selection clause.

This Court has not had prior occasion to consider the meaning of the "based upon" requirement of section 1605 (a) (2).[17] As ever, this inquiry must begin with the statutory language. *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 512 (1981). In clause 1 of this section, the phrase "based upon" has as its direct object words of art ("a commercial activity") that Congress took care specially to define in section 1603(d) as "a regular course of commercial conduct *or* a particular commercial transaction *or* act." (Emphasis added.) By contrast, clauses 2 and 3 of the same section are more narrowly focused, requiring that the case be "based upon" some core jurisdictional "act," rather than upon the more broadly defined "commercial activity."[18] Accordingly, the statutory language establishes that the element upon which jurisdiction uniquely depends in clause 1 (*i.e.*, that upon

[17] In *Weltover*, 112 S. Ct. at 2165, it was uncontested that the suit was "based upon" an "act" outside the United States as contemplated for purposes of "direct effect" jurisdiction under clause 3 of section 1605(a) (2)—*i.e.*, Argentina's "unilateral extension" of its debt payments.

[18] That section 1605(a) (2) contemplates a greater breadth of activity upon which jurisdiction may be based in clause 1 than in clause 2 or 3 is consistent with the overall structure of the statute. Where, as here, jurisdiction may be predicated on a course of commercial conduct or transaction, "substantial contact" with the United States is required. By contrast, the commercial activity contemplated by clause 2 is carried on elsewhere, and the basis for the action, therefore, must be found in an "act performed in the United States." In clause 3, both the act upon which the suit rests and the commercial activity with which it is connected are performed elsewhere, and jurisdiction arises only if that act has the required "direct effect" here.

which the action may be deemed to be "based" for purposes of U.S. jurisdiction) is not limited merely to a discrete act, but rather also may encompass a "transaction" or, more broadly still, a "regular course of * * * conduct," provided it is "commercial" (and has "substantial contact" with the United States).

This comparison to clauses 2 and 3 demonstrates that "the drafters of the FSIA intended no * * * niggardly construction" of what a "suit might be said to be 'based upon'" for purposes of establishing jurisdiction under clause 1. *Gemini Shipping, Inc. v. Foreign Trade Org. for Chemicals and Foodstuffs*, 647 F.2d 317, 319 (2d Cir. 1981). In its ordinary sense, the word "based" would refer to the "foundation" of the action, or that upon which it rests or stands. In that sense, the basis of an action may properly be determined with reference to "the elements of the cause of action" or "the gravamen of the complaint," *Callejo*, 764 F.2d at 1109; or the existence of some "direct causal connection" between the commercial activity and the "wrong" complained of, "giving rise to" the claims, *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 & n.22 (D.C. Cir. 1982); or evidence of "commercial activity * * * plus a theory, a gravamen, that the plaintiff's injuries arise from the commercial activity." *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 947 F.2d 218, 221 (6th Cir. 1991), *cert. dismissed*, 112 S. Ct. 1657 (1992).

By this standard, the Nelsons' causes of action clearly are "based upon" a regular course of commercial conduct, or commercial transaction or act, carried on equally by the Hospital and its Owner.[19] The complaint alleges injuries that "arose from" and were "directly caused" by the Hospital's employment practices. The gravamen or

[19] Inasmuch as Mrs. Nelson's claims (J.A. 11, 16, 20) are derivative in nature, they are necessarily based upon the same commercial activities as are her husband's.

theory of the complaint relates these injuries to wrongful retaliation taken against Nelson for his job performance. The Nelsons' causes of action rest upon conduct that was "part and parcel" of the Hospital enterprise and therefore within the ambit of clause 1 of section 1605(a)(2). *Gemini Shipping*, 647 F.2d at 319.

Petitioners advance an interpretation of the "based upon" requirement that disregards the plain language of the statute, and the distinction it compels between the jurisdictional elements of clause 1 and the other two clauses of section 1605(a)(2). Their construction would limit the basis for jurisdiction under clause 1 to the particular "damage-causing acts complained of." (Pet. Br. at 18) As demonstrated above, clause 1 is not limited to "acts complained of." Moreover, even on Petitioners' construction, the focus must be on the retaliatory actions taken against Nelson for dutiful performance of his employment—actions commercial in nature. Indeed, the complaint neither does nor could allege any other act of the Hospital that might have caused Nelson's damages. Even if it were possible to identify some other Hospital conduct that caused Nelson's injuries, the result would not change. No matter what precise words are used to describe the required jurisdictional link between an action and a commercial activity, here that link is forged: from beginning to end, this action is squarely based upon the Hospital's regular course of conduct in staffing, maintaining and operating a health case enterprise. The action is equally based upon its particular transaction in engaging Nelson as an employee with specific responsibilities in that enterprise, and on its particular acts in disciplining Nelson for performing those responsibilities. As Respondents demonstrate below, such activities are commercial in nature.

1. *The Hospital, Its Employment Practices, And Its Particular Tortious Acts Against Nelson Are Commercial In Nature*

Section 1603(d) of the FSIA provides that the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose. Here, the course of conduct engaged in by the Hospital, and every relevant "transaction or act," has this "commercial character."

In *Weltover*, 112 S. Ct. at 2165, the Court noted that the term "commercial" was left "largely undefined" by Congress in the FSIA. Consistent with the Congressional purpose, however, *Weltover* reasoned that "commercial" should have "the meaning generally attached to that term under the restrictive theory [of sovereign immunity] at the time the statute was enacted." *Id.* Finding "significant assistance" in the plurality opinion in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976), a decision announced just six months before the FSIA was enacted, *Weltover* held that "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." 112 S. Ct. at 2166.

> Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," * * * the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in "trade and traffic or commerce," Black's Law Dictionary 270 (6th ed. 1990).

Id. (emphasis in original) (citing *Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*, 877 F.2d 574, 578 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989)). *Weltover* thus directs an analysis of "the outward form of the conduct that the foreign state performs or agrees to perform" and whether it is of a nature that might likewise be engaged in by a private person or company. 112 S. Ct. at 2166-67.

Against this standard, it is clear that the Hospital acted "not as regulator of a market, but in the manner of a private player within it." *Id.* at 2166. The "provision of health care services" and employment arrangements relating to such services are not "of a peculiarly governmental nature." *Rush-Presbyterian*, 877 F.2d at 581. No less than "the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation," the operation of the Hospital necessarily involves a "regular course of commercial conduct." House Report at 16.

In particular, those aspects of the operation that relate to the recruiting, engaging, managing and disciplining of the Hospital's staff are essential to its inherently commercial mission of "provid[ing] medical services such as cancer treatment, bone marrow transplants, and kidney dialysis and transplants" to "individuals with serious, often terminal diseases." (J.A. 22) As the House Report indicates, Congress expressly intended that such activities as a "foreign government's * * * *employment or engagement* of laborers, clerical staff or public relations or marketing agents" be included "within the definition [of commercial activity]." House Report at 16 (emphasis added); *see also id.* ("employment of American citizens or third country nationals * * * in the United States" is "commercial in nature," unlike "employment of diplomatic, civil service, or military personnel").

The Hospital's engagement of Nelson and the subsequent disciplinary measures it took against him were part and parcel of its regular course of conduct in en-

gaging and supervising employees to operate the enterprise. Both in respect of its particular transaction in engaging Nelson as a monitoring systems engineer and its particular act of retribution against him for the proper performance of his assigned duties, the Hospital conducted itself in a manner indistinguishable from that in which a private hospital might have in similar circumstances. Indeed, had Hospital officials employed Nelson and then retaliated against him by wrongfully terminating his contract, there is no doubt that that transaction and its constituent acts would be deemed commercial or private under the FSIA. House Report at 19 (commercial activity would include "the wrongful discharge * * * of an employee of the foreign state"); *see also Segni v. Commercial Office of Spain*, 835 F.2d 160, 165 (7th Cir. 1987). The fact that in Nelson's case the particular act of retaliation was not limited to discharge does not make it any less private or commercial in nature; that it involved detention and torture rather than routine acts and a letter of dismissal is hardly dispositive.[20]

The Hospital's activities do not lose their commercial character merely because they give rise to an action in tort rather than in contract. (Pet. Br. at 29-30) As the United States acknowledges in its brief *amicus curiae*, the FSIA contemplates that when a foreign state acts in its private or commercial capacity, it is subject to actions sounding in tort to the same extent as a private party. (Brief for the United States as *Amicus Curiae* [hereinafter "U.S. Br."] at 22) Section 1605(a)(2) is not limited by its terms to contract cases, but applies to "any case" in which the "action is based upon a commercial activity." That section 1605(a)(2) includes any tort case is unavoidably implied by the language of section 1605

[20] *See LeDonne v. Gulf Air, Inc.*, 700 F. Supp. 1400, 1409 (E.D. Va. 1988) (acts of state-owned airline in making false statements to FBI resulting in criminal indictment of its former employee are "manifestly private and commercial").

(a)(5), which provides an exception to foreign state immunity in certain cases "*not otherwise encompassed in paragraph (2)* above, in which money damages are sought against a foreign state for personal injury." (Emphasis added.) *See Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, 905 F.2d 1375, 1388 (5th Cir. 1992).[21] Accordingly, under section 1605(a)(2), the courts have not hesitated to assert jurisdiction over commercial enterprises like the Hospital in actions based upon activities giving rise to liability in tort *or* contract.[22]

[21] Petitioners argue that even if this action would otherwise be maintainable under section 1605(a)(2), it is "based upon" an alleged "abuse of process" and thus barred by subsection 1605(a)(5)(B), which excludes claims arising out of "malicious prosecution" and "abuse of process," among others. (Pet. Br. at 29 n.18) Consistent with the allegations in the complaint, the short answer is that Nelson was not "prosecuted" or made the subject of any ostensible "process." Moreover, Petitioner's argument "flies directly in the face" of the statutory language:

> Section 1605(a)(5)(B) applies only in those instances "not otherwise covered in paragraph (2)." In other words, foreign states enjoy immunity from claims for libel, slander, malicious prosecution and misrepresentation *only* when the foreign state is engaged in governmental activities. Immunity does not attach under Section 1605(a)(5)(B) where * * * the activity is commercial in nature.

LeDonne, 700 F. Supp. at 1410 (emphasis in original); *accord Gilson*, 682 F.2d at 1028 n.27; *Tifa Ltd. v. Republic of Ghana*, 692 F. Supp. 393, 404 (D.N.J. 1988); *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 855 (S.D.N.Y. 1978).

[22] *See, e.g., Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1378-80 (5th Cir. 1980); *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 273-75 (3d Cir. 1980); *Ohntrup v. Firearms Center Inc.*, 516 F. Supp. 1281, 1286-87 (E.D. Pa. 1981) *aff'd mem.*, 760 F.2d 259 & 263 (3d Cir. 1985). This interpretation is also supported by the legislative history. House Report at 17 (section 1605(a)(2) applies to "business torts").

2. *The Alleged Law Enforcement "Nexus" Does Not Divest The Hospital's Activities Of Their Commercial Nature*

With respect to Nelson's causes of action for battery (Count X) and false imprisonment (Count XI), the complaint states that, as "a direct and proximate result of" his reporting "safety hazards [at the Hospital] to a special investigative body of the Saudi Arabian Government," Nelson was "summoned by agents or employees of [the Hospital] to the [H]ospital's security office from which he was transported to a jail cell, shackled, tortured and beaten by persons acting at the direction, instigation, provocation, instruction or request of" the Hospital. (J.A. 13-14) Nelson's affidavit, which Petitioners made part of the record below, further charges the Hospital with knowledge of and involvement in Nelson's initial detention and torture, through a Hospital employee (the only actor Nelson was able to identify) who served as interpreter for Nelson's captors. (J.A. 59)

Petitioners would have the Court conclude that these and similar allegations of the complaint against Saudi Arabia and Royspec, assumed to be true and fairly read, point inescapably to the work of Saudi law enforcement personnel and the Saudi "law enforcement system," exercising "inherently sovereign law enforcement functions" over which there can be no U.S. jurisdiction.[23]

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[23] (Pet. Br. at 14) To support this assertion, Petitioners cite to the use in the complaint of terms such as "arrest," "prison," and "police" which principally appear in those causes of action asserted directly against Saudi Arabia and in the statement of various alternative theories of liability under international law. (Pet. Br. at 33) The significance of these terms must be weighed in accordance with the accustomed rule that the facts alleged are to be generously construed. *E.g., Scheuer*, 416 U.S. at 236-37; *Foremost-McKesson*, 905 F.2d at 440 n.3; *Gilson*, 682 F.2d at 1026. In the absence of discovery, Nelson is unable to determine whether those who falsely imprisoned and tortured him were agents or employees

The necessary implication is that any wrongful conduct by Petitioners in their commercial character was "subsumed within a sovereign activity" by some "process of law," *Foremost-McKesson*, 905 F.2d at 450, or that this conduct acquired some "derivative immunity," *Callejo*, 764 F.2d at 1109-10, to which it otherwise would not be entitled. To settle the question, Petitioners invite the Court to speculate outside the record that Saudi law enforcement personnel became involved in the normal course (presumably at the Hospital's bidding) following the discovery months earlier that Nelson had misrepresented his employment credentials during the prior year while in the United States. While uniquely possessed of the means to prove these claims, Petitioners have included no such proof in the record, and the claims are strongly disputed by the Nelsons.

Even were it possible, resolution of the issue at this stage would be inappropriate and is unnecessary. It is only necessary to determine that the alleged conduct of the Hospital and its Owner, upon which the various causes of action are based, is "commercial" in nature. The "outward form" of that conduct—broadly defined as employment practices and narrowly as employee "disciplinary procedures" [24]—is such that it might be engaged

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of the Hospital, Royspec, Saudi Arabia, or some combination thereof. The complaint asserts that, whoever they were, they were "acting at the direction, instigation, provocation, instruction or request" of the Hospital. (J.A. 14) Nelson does not dispute that by the time his detention began at "Al Sijan" ("the prison"), he was in the keeping of Saudi prison authorities.

[24] "Disciplinary procedures" is what the Hospital, in its employment contract with Nelson, called the actions it might take in the event of any "infraction" of the Hospital's "rules, regulations and policies." The contract reserved the Hospital's right to discharge him for "[s]uch infractions includ[ing] * * * forgery to obtain employment * * *." (J.A. 43-44) Even assuming that the actions visited on Nelson by the Hospital related not to the grease valve problem but to his employment credentials, therefore, those actions are no less "commercial"—being bound up with the Hospital's

in by any hospital employer.[25] Similarly, the engagement of law enforcement authorities to falsely imprison and otherwise inflict injury upon another is activity that private institutions can perform.[26] Accordingly, the commercial nature of the conduct is not lost merely because the conduct is injurious, illegal, outrageous, or has some unspecified "nexus" to allegedly sovereign activity. *See Walter Fuller Aircraft Sales, Inc.*, 965 F.2d at 1385.

Moreover, there is no basis for concluding that the Saudi government divested the Hospital, itself an inherently commercial enterprise, of its normal character and thereby cloaked it with the immunity of a police department or correctional facility. *Cf., Dunhill*, 425 U.S. at 692, 695 (unwilling, absent evidence of a "statute, decree, order or resolution" of Cuba, to infer that its agencies had been "invested with sovereign authority" to expropriate private property); *The "Gul Djemal,"* 264 U.S. 90, 95 (1924) (mere representation of master not

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overall employment practices, the internal guidelines of the hospital enterprise, and apparently a standard feature of its employment agreements. Under the HCA contract, these and all other terms of the Nelson employment agreement were expressly approved by Saudi Arabia as Owner. (J.A. 72)

[25] The complaint posits that the Hospital retaliated against Nelson for trying to correct known safety hazards, as his job required him to do. To demonstrate that such retaliation is a form of conduct well known to the marketplace, one need only consult the common law doctrine of retaliatory discharge, and the genesis of more recent federal and state statutes protecting "whistleblowers." *See, e.g., Belline v. K-Mart Corp.*, 940 F.2d 184, 186-89 (7th Cir. 1991); *White v. General Motors Corp.*, 908 F.2d 669, 671 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 788 (1991); *Norris v. Lumbermen's Mut. Casualty Co.*, 881 F.2d 1144, 1153 (1st Cir. 1989); Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989), N.H. REV. STAT. ANN. § 275-E (1988); OHIO REV. CODE ANN. § 4113 (Anderson 1991); PA. STAT. ANN. tit. 43, § 1423 (1986).

[26] *See, e.g., Rosario v. Amalgamated Ladies' Garment Cutters' Union*, 605 F.2d 1228, 1248 (2d Cir.), *cert. denied*, 466 U.S. 919 (1980); *Nail v. Rinker Materials Corp.*, 528 So. 2d 450, 451-52 (Fla. Dist. Ct. App. 1988).

"adequate reason to presume" immunity of government-owned vessel "not functioning in naval or military capacity but engaged in commerce"). *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980), and other cases relied upon by Petitioners,[27] are simply inapposite. In *Arango*, a suit for tort and breach of contract brought against the national airline of the Dominican Republic, plaintiffs were denied entry at the Santo Domingo airport by Dominican immigration officers who "compelled [their] immediate, 'involuntary re-routing'" by the airline out of the country, "because of their inclusion on an official list of 'undesirable aliens.'" 621 F.2d at 1373. The district court dismissed claims against the airline for false imprisonment and battery. In affirming the dismissal, the Fifth Circuit reasoned that, despite the fact that the airline's activities ordinarily were commercial in character, the airline was here "entitled to the same immunity" as the government itself, by virtue of having been "impressed into service to perform these [governmental] functions * * * by Dominican immigration officials pursuant to that country's laws." *Id.* at 1379 (citing *Papagianakis v. SAMOS*, 186 F.2d 257, 261-62 (4th Cir. 1950), *cert. denied*, 341 U.S. 921 (1951)).

Petitioners do not claim that the Hospital was "impressed into service," compelled or even authorized to

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[27] While Petitioners cite several cases for the unremarkable proposition that police activities are sovereign in nature, these cases do not involve actions where, as here, a foreign state-owned commercial enterprise is attempting to claim some derivative immunity based on the activities of that state's police department. *E.g. Herbage v. Meese*, 747 F. Supp. 60, 66-67 (D.D.C. 1990), *aff'd*, 946 F.2d 1564 (D.C. Cir.), *cert. denied*, 112 S. Ct. 605 (1991) (acts of British law enforcement and prosecutorial officials in obtaining plaintiff's extradition are sovereign); *Tucker v. Whitaker Travel, Ltd.*, 620 F. Supp. 578, 586 (E.D. Pa. 1985), *aff'd mem.*, 800 F.2d 1140 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986) (foreign state's decision not to investigate horse-back riding accident is sovereign); *Perez v. The Bahamas*, 482 F. Supp. 1208, 1210 (D.D.C. 1980), *aff'd*, 652 F.2d 186 (D.C. Cir.), *cert. denied*, 454 U.S. 865 (1981) (police enforcement of Bahamian fishing laws).

perform law enforcement functions by Saudi Arabia pursuant to law, as would be required to bring the case within the rule of *Arango*.[28] Indeed, they offer no theory or proof except *ipse dixit* on which to base the proposition that the Hospital's alleged wrongful conduct is subsumed in or derives immunity from law enforcement or any other governmental activity. The Act permits such a conclusion only under extraordinary circumstances. Its history reflects an intent to affect neither "the substantive law of liability" nor "the attribution of responsibility between or among entities of a foreign state." House Report at 12. Liability for the acts of the Hospital may be attributed to the Saudi government as Owner only upon proof of such extensive control as to justify disregarding their separate juridical existence; the Petitioners' implied claim that immunity for the acts of the Hospital may be derived from the same government should depend upon no less substantial a showing that the sovereign nature of the government's functions has been transferred to the Hospital. Absent such proof, the only "sound principle," as Chief Justice Marshall remarked in a related context, is this:

> [W]hen a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.

Bank of United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904, 907 (1824), *quoted in Hearings on H.R. 11315* at 30 (testimony of Mr. Ristau).

[28] The allegations of the complaint and undisputed facts in the record, including the absence of any indicia of regular or authorized law enforcement activity, permit only the opposite inference: that the Hospital recruited Saudi law enforcement personnel (to the extent they may have been involved) into its service—not the other way around. If discovery supports this inference, those law enforcement personnel could only be thought to have taken on the commercial character of the Hospital enterprise that enlisted them. Under these circumstances, of course, neither the Hospital nor Saudi Arabia would be entitled to any immunity under the FSIA. *See Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1003 (D.C. Cir. 1985) (holding acts of foreign embassy in assisting its state-owned shipping enterprise in extracting payments from plaintiffs were "essentially those of a collection agent, acting on behalf of its principal * * * and not that of a foreign sovereign diplomatically attempting to maintain friendly relations").

Moreover, the particular nature of the conduct alleged here—physical torture and arbitrary detention—is plainly unlawful and especially repugnant. That conduct is not of a kind lightly to be attributed to the sovereign "exercise of the police power by a foreign state" (Pet. Br. at 16 n.12), particularly (as here) for purposes of shielding that state's commercial enterprise. "Among the rights universally proclaimed by all nations * * * is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become—like the pirate and the slave trader before him—*hostis humani generis*, an enemy of all mankind." *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). The "right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992). Similarly, the act of arbitrary and indefinite detention is universally considered a violation of international law.[29] From just these universal principles spring the alternative theories of liability asserted not against the Hospital but solely against Saudi Arabia in Counts III through VII of the

[29] *See, e.g., Fernandez v. Wilkinson*, 505 F. Supp. 787, 798 (D. Kan. 1980), *aff'd*, 654 F.2d 1382 (10th Cir. 1981); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702(e) (1987).

complaint. (J.A. 6-11) Whether Saudi Arabia in its sovereign capacity may be subject to U.S. jurisdiction based on these theories does not derogate from U.S. jurisdiction due the Hospital, or Saudi Arabia as its Owner, in an action (such as this) also independently based upon the Hospital's commercial activities.[30]

Even if Saudi law enforcement personnel did wrongfully connive in Nelson's torture and arbitrary detention, the purpose of the FSIA is "not to protect the sensitivities of 19th-century monarchs or the prerogatives of the 20th-century state." *Hearings on H.R. 11315* at 27 (testimony of Monroe Leigh, Legal Adviser, Department of State). Thus, as Petitioners themselves acknowledge, the Act does not look to whether the assertion of jurisdiction will implicate the political sensitivities of the foreign state in determining whether an act should be deemed commercial or sovereign. (Pet. Br. at 35)[31]

To the degree that review of the acts at issue here raises such sensitivities or "implicate[s] * * * foreign policy concerns" (Pet. Br. at 32-33),[32] those concerns

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[30] Should the Court determine that, despite their commercial setting, the Hospital's activities are indistinguishable from those of a law enforcement authority, it nonetheless should decline to extend its holding in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), to these activities, because they are so fundamentally at odds with the most basic and universally accepted standards of international law.

[31] *See Hearings on H.R. 11315* at 30 (testimony of Mr. Ristau) ("it is manifest now that the adjudication of a commercial claim against a foreign state on the merits does not affront the sovereignty of a foreign nation because sovereignty, as such, is not implicated in such an adjudication").

[32] Petitioners' claim that the foreign policy interests of the United States are implicated in this case is belied by the fact that the U.S. Government asserts no such interest in its submission to this Court. The U.S. Government has described its interests as relating solely to the correct interpretation of the FSIA. (U.S. Br. at 1)

must be addressed solely with reference to the act of state doctrine. As described in the plurality opinion in *Dunhill*, the doctrine's

> major underpinning * * * is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations.

425 U.S. at 697.

As the issue of whether this action is barred by the act of state doctrine was not reached by the district court (J.A. 97) or by the Eleventh Circuit (J.A. 133), it is not properly before this Court. Nevertheless, it is worth noting that even if the individuals who wrongfully imprisoned and tortured Nelson were Saudi law enforcement personnel acting "under color of law," their acts were not acts of state. Petitioners represented to the district court below that it "would be contrary to Saudi law" for "any person or entity in Saudi Arabia * * * to have persons summarily arrested, detained and physically abused without legal cause." (J.A. 68) Accordingly, the acts alleged could not possibly have had the official authorization of the Saudi government and, hence, they can in no sense be characterized as official acts of state. *E.g., Filartiga*, 630 F.2d at 889; *Sharon v. Time, Inc.*, 599 F. Supp. 538, 544 (S.D.N.Y. 1984).

Even if these acts could have been authorized, this Court has held that "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). Given the extraordinary degree of codification and consensus concerning the principle that torture and arbitrary imprisonment constitute egregious violations of international law, there is no reason to suppose that the assumption of jurisdiction

by a U.S. court would give justifiable offense to Saudi Arabia.[33]

C. Nelson's Negligence Claims Likewise Are Based Upon The Commercial Activities Of The Hospital

Respondents' negligence claims also are based upon commercial activities. Those claims, stated in Counts IX, XV, and I, against the Hospital, Royspec and Saudi Arabia, respectively, allege the breach of a duty (as Nelson's "recruiter and/or employer") to exercise due care to prevent Nelson's injury. (J.A. 5-6, 14) In particular, they assert that Petitioners breached their duty, at various times beginning with the period Nelson was recruited in the United States, to warn him of risks associated with his employment in Saudi Arabia—including the propensity of the Saudi government and Saudi institutions like the Hospital "to have persons summarily arrested, detained, and physically abused," and the risk of "severe retaliatory action" should he "attempt[] to remedy, and/or disclose[] to others any health-related or other hazards or problems" he might uncover in his job. (J.A. 5-6, 14)

Petitioners assert that in these claims Respondents merely "recast their injuries as resulting from a failure

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[33] *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 862 (E.D.N.Y. 1984); *accord Liu v. Republic of China*, 892 F.2d 1419, 1433 (9th Cir. 1989), *cert. dismissed*, 111 S. Ct. 27 (1990). Even if the alleged acts of torture and arbitrary imprisonment could somehow be described as acts of state, the doctrine would not bar this action because it does not require a court to pass upon the validity of these acts. *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 407 (1990); *Sharon*, 599 F. Supp. at 546-47. The outcome of this case does not turn upon whether any alleged acts of Saudi officials in arbitrarily detaining, and torturing Nelson were valid—both Petitioners and Respondents agree that they could not have been. Instead, the ultimate issue turns upon whether these acts occurred and may be laid at the door of a hospital. The determination of this issue does not implicate the act of state doctrine. *W.S. Kirkpatrick*, 493 U.S. at 407; *Sharon*, 599 F. Supp. at 545.

to warn," and they argue that the "gravamen of the[] complaint" is not a duty to warn, but "the alleged wrongful arrest, false imprisonment, and torture." [34] (Pet. Br. at 38) This argument is unavailing because the negligence counts of the complaint proceed from an independent duty of the Hospital, its Owner, and Royspec its agent, as Nelson's "recruiter and/or employer," to *prevent* his injury,[35] including a specific duty to warn him of readily foreseeable dangers associated with his job.[36] Whether these dangers are confined to "foreign law enforcement practices" (U.S. Br. at 26), or more broadly may encompass the foreign state's own employment practices overseas, the underlying duties at common law are commercial in nature.

Whatever standards of conduct the FSIA may permit U.S. courts to enforce against the Hospital and its Owner with respect to their imprisoning and torturing those

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[34] Petitioners cite *United States v. Shearer*, 473 U.S. 52 (1985), in which the Court held that a claim against the United States for negligent supervision, giving rise to kidnapping and murder, was barred by the Federal Tort Claims Act ("FTCA"). *Shearer* did not involve an independent duty as exists here. *See, e.g., Doe v. United States*, 838 F.2d 220, 223 (7th Cir. 1988); *Kearney v. United States*, 815 F.2d 535, 537 (9th Cir. 1987). Moreover, its conclusion was impelled by the "sweeping language" of section 2680(h) of the FTCA, which "*excludes* any claim *arising out of* assault or battery," including one that may "sound in negligence but stem from a battery." *Shearer*, 473 U.S. at 55 (emphasis added and in original). By contrast, section 1605(a)(2) of the FSIA *includes* "any case" in which "the action is based upon a commercial activity."

[35] Thus, if torture at the hands of Saudi "law enforcement" is a foreseeable consequence of one's detention there, then Petitioners breached their general duty to prevent Nelson's injury by (as the complaint alleges) wrongly causing Nelson's arrest or detention.

[36] The Hospital's failure to warn Nelson that the performance of job related functions might expose him to such "law enforcement" practices likewise would breach its duty. *E.g., Richards v. Harrison*, 262 So. 2d 258, 260 (Fla. Dist. Ct. App. 1972).

Americans in Saudi Arabia whom they have recruited and employed here, such recruitment and employment activity clearly is "commercial" in character. Similarly, when a foreign state and its instrumentality conduct such activity in this country, they are acting in a manner indistinguishable from a private employer and are subject to federal and state laws governing the hiring of employees, including the common law of torts.[37] Accordingly, when they violate these statutes or breach their duties under the common law, they should be subject to the jurisdiction of the U.S. courts under the commercial activities exception.

This conclusion loses none of its force merely because such review might require an examination of the Hospital's employment practices or even an "expansive inquiry into police practices of Saudi Arabia." (Pet. Br. at 38) Petitioners' understandable concern to avoid such a review is irrelevant to the determination of whether it may as a foreign state lay claim to immunity for its commercial activities where, as here, the action rests upon conduct having abundant contact with the United States.

D. The Commercial Activities Of The Hospital Have Substantial Contact With The United States

Respondents have demonstrated that their actions against the Hospital and its Owner are based upon a regular course of commercial conduct or a specific commercial transaction or act as required by clause 1 of section 1605(a)(2) and its companion definitions in sections 1603(d) and (e). Because the same conduct, transactions or acts have "substantial contact" with the United States, the FSIA confers jurisdiction over these causes of action.

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[37] *See Arango*, 621 F.2d at 1380 (claims based on state-owned airline's failure to warn of danger that passengers may not be permitted to enter Dominican Republic stem from "commercial activity" and hence are not barred by the FSIA).

In its *amicus* brief, the United States suggests that clause 1 restricts jurisdiction to cases in which the commercial activities providing the basis for the claim, occur in this country. (U.S. Br. at 23) This limiting construction directly conflicts with the plain language, structure, and underlying purposes of the FSIA.

Section 1603(e) specifically defines "commercial activity carried on in the United States by a foreign state," a phrase that appears only in clause 1, to mean "activity carried on by such [foreign] state and having substantial contact with the United States." This language does not limit the commercial activity upon which the action is based to events or occurrences in the United States. Rather, as Petitioners themselves acknowledge, it means what it says: it merely requires that this commercial activity—much or all of which may have occurred elsewhere—have some "substantial contact with the United States." 28 U.S.C. § 1603(e).[38] (Pet. Br. at 22)

The language of clause 2 lends strong support to this common-sense reading of the first clause of section 1605(a)(2). By contrast to clause 1 and its "substantial

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[38] *E.g., Ministry of Supply, Cairo v. Universe Tankships, Inc.*, 708 F.2d 80, 84 (2d Cir. 1983); *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 272-73 (3d Cir. 1980). In *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195 (5th Cir. 1984) (per curiam), the Fifth Circuit rejected a "literal" interpretation of clause 1, which would have required the commercial activity upon which the action is based to occur in the United States. *Id.* at 200. The court found this interpretation to be inconsistent with the statutory purpose and, instead, adopted a nexus approach that would support jurisdiction here. *Id.* at 202. *Vencedora* overlooked the significance for clause 1 of the definition in section 1603(e) and thus was wrong in believing that its approach compromised the "literal" statutory language. Indeed, under the approach *Vencedora* rejected, the "substantial contact" definition set forth in section 1603(e) would have been rendered meaningless. At any rate, *Vencedora*'s "nexus" test has been widely accepted and its application has not turned U.S. courts into "small international courts of claims." *Verlinden*, 461 U.S. at 490.

contact" standard, clause 2 requires that the action be "based * * * upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." (Emphasis added.) Thus, when Congress chose to limit the jurisdictionally significant conduct to an act, event or occurrence taking place in the United States, it knew how to make that limitation clear in the statute. *See Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 273 (3d Cir. 1980).

Fundamental principles of statutory interpretation dictate that the language of clause 1 of section 1605(a)(2) and the companion definition be construed in accordance with their literal meaning unless it can be demonstrated that such "'literal application [would] produce a result demonstrably at odds with the intentions of its drafters.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). Here, a literal reading is entirely consistent with the statutory purpose. That the FSIA prescribes some form of significant contact with the United States reflects Congress' underlying purpose to meet the demands of due process and avoid the risk of transforming our courts into "small international courts of claims" ready to resolve disputes between private parties and foreign states "anywhere in the world." *Verlinden*, 461 U.S. at 490 (quoting *Hearings on H.R. 11315, supra* at 31 (testimony of Mr. Ristau). The language of clause 1, incorporating terms expressly defined in section 1603(e), demonstrates that these Congressional purposes are fully served by a requirement that the particular commercial transaction or act or regular course of commercial conduct upon which the claim is based have substantial U.S. contact.[39]

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[39] Congress found it "advisable" in clause 2 "to provide expressly for the case where a claim arises out of a specific act in the United States" and noted "that the acts (or omissions) encompassed in this category [i.e., clause 2] are limited to those which in and of themselves are sufficient to form the basis of a cause of action." House Report at 19. Far from supporting either the position of Petitioners or that of the U.S. Government, this House Report language only serves to confirm that the activities encompassed in clause 1 are not so limited.

While the "substantial contact" standard of clause 1 of section 1605(a)(2) does not limit the basis for the action to commercial events or occurrences in the United States, it nonetheless demands more than the mere "U.S. citizenship or U.S. residence of the plaintiff." House Report at 17. Nor does it suffice that, but for the performance of some commercial activity in the United States, the plaintiff would not have been present in a foreign state. *E.g., Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1514 (D.C. Cir. 1988). Instead, as the great majority of circuit courts have held, clause 1 requires that there be a "material connection" (a "nexus") between the commercial activity upon which the action is based and an act or series of acts that is performed in the United States.[40] This requirement of a "material connection" is faithful to the "substantial contact" standard laid down by Congress in the statute itself.[41]

Here, relevant operations of the Hospital have not just some material connection or substantial contact with the United States. From its very inception through at least the time Nelson was detained and tortured, the Hospital was critically dependent upon and, in that sense, owed its very existence to, the recruitment from the United States of skilled expatriate personnel for its "med-

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[40] *E.g., Barkanic v. General Admin. of Civil Aviation*, 822 F.2d 11, 13 (2d Cir.), *cert. denied*, 484 U.S. 964 (1987); *Sugarman*, 626 F.2d at 272-73; *Gerding v. Republic of France*, 943 F.2d 521, 527 (4th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3481 (U.S. Dec. 4, 1991) (No. 91-956); *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 947 F.2d at 220; *Siderman de Blake*, 965 F.2d at 709.

[41] It is also consistent with the legislative history. *See* House Report at 13 (describing jurisdictional exceptions in section 1605 as "requir[ing] some connection between the lawsuit and the United States"); *id.* at 18 (describing section 1605(a)(2) as an exception for "[c]ommercial activities having a nexus with the United States").

ical city," including the state-of-the-art, 245-bed hospital. (J.A. 25, 71)

Thus, in 1973, Saudi Arabia and the Hospital engaged an American corporation from its offices in Tennessee as their agent to "recruit and employ administrative, nursing, technical, maintenance and all other personnel" "required to open and operate the Hospital." (J.A. 72-73) As part of a "worldwide" recruitment effort, HCA undertook to engage "expatriate personnel" in the United States to work in Saudi Arabia at the Hospital. In 1983, as a small part of this ongoing program, HCA advertised in the American media for a systems engineer. There is nothing to suggest that what ensued makes the Hospital's activities in engaging Nelson different from its activities in engaging the multitude of other expatriate personnel presumably required for full staffing and proper operation of the Hospital. Nelson read an advertisement in the United States. The Hospital communicated with HCA in Tennessee authorizing it to hire Nelson. HCA thereafter successfully recruited him in the United States to fill the position. An employment contract was signed by both parties in the United States. Before departing for Saudi Arabia, Nelson completed various application, processing and medical screening and orientation requirements in the United States.

In light of this record, it is extraordinary that Petitioners should characterize Nelson's signing of an employment contract in the United States as "a fortuitous happenstance" and its contacts with the United States as so "limited" that they "would not provide even the 'minimum contacts' necessary under the due process clause for personal jurisdiction." (Pet. Br. at 46) The Hospital's (and, as its Owner, Saudia Arabia's) contacts with the United States—sustained for more than a decade at the time of Nelson's wrongful imprisonment and torture—were deliberate, extensive, and continuous. In short, they are vastly greater than would be required to meet the

substantial contact requirement of section 1605(a)(2), much less to raise a "reasonabl[e] anticipat[ion of] being haled into court."[42] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

The United States suggests that "it is not so clear" that the Hospital (as opposed to its Owner) "has carried on a commercial activity in this country." (U.S. Br. at 14 n.9, 24 n.16) Here, the United States directly contradicts Petitioners' own sworn declaration that the "[Hospital] has a contract with HCA vesting [in it] exclusive responsibility for recruiting in the U.S." (J.A. 30), and the admission in Petitioners' brief (Pet. Br. at 48) that the recruitment of Nelson himself "was performed * * * by HCA, as required by the terms of the contract between HCA and the Hospital."[43] It is apparent that the Hospital, directly and through its agents, had substantial contacts in the United States consisting at the very least of employee recruitment, advertising, hiring, and training, all as alleged in the complaint. (J.A. 13)

These substantial U.S. contacts of the Hospital and Saudi Arabia as its Owner are not only relevant to Nelson's claims, they provide the precise factual context in which those claims arise. Petitioners chose to avail themselves extensively of our employment market. They entered here on an employment relationship with Nelson. They defined here the object of that relationship—namely,

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[42] Petitioners urge (Pet. Br. at 44 n.25) that the U.S. contacts of a commercial agent such as HCA should not be attributed to a "foreign state" principal (presumably including its agency or instrumentality) for jurisdictional purposes. As the United States implicitly recognizes in its *amicus* brief (U.S. Br. at 13-14), such a construction would render the commercial activities exception meaningless. *See Gilson*, 682 F.2d at 1026 n.16; *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d at 453.

[43] Indeed, for all relevant purposes, as Petitioners appear to concede, the Hospital's commercial activities in the United States were coextensive with those of Saudi Arabia as its Owner.

securing Nelson's services to maintain the Hospital's systems in safe order. They retaliated against him for the faithful performance of precisely those services that they here recruited and engaged him to perform. Although nothing more is required by section 1605(a)(2), these same U.S. contacts are essential to any legal understanding of Nelson's claims. At a minimum, the alleged acts of retaliation are fundamentally at odds with the "reasonable diligence" and the "watchfulness, caution, and foresight" necessarily "implie[d] * * * as between the employer and employee." *Wabash Ry. v. McDaniels*, 107 U.S. 454, 460 (1883).[44]

Respondents do not argue that the "substantial contact" requirement of clause 1 of section 1605(a)(2) is satisfied simply because, "but for" Nelson's recruitment and engagement in the United States, "he would not have worked in Saudi Arabia, and therefore, he would not have been arrested, imprisoned, or allegedly tortured." (Pet. Br. at 39-40) Rather, the fact that Petitioners were engaged in a regular course of recruitment and employment in the United States, the circumstances of the particular transaction by which they engaged Nelson in the United States, the reasons for which they hired him and for which they later injured him (*i.e.*, his "troubleshooting" Hospital systems), and the minimum affirmative duty of care necessarily implied out of that employment relationship established here—singly or together—supply all the material connection or substantial contact required under clause 1 with respect to Nelson's intentional tort claims.

Petitioners also argue that Nelson's negligence claims have no substantial contact with the United States. In particular, they state that any duty to warn Nelson of the job-related dangers identified in the complaint arose in Saudi Arabia, "the overwhelmingly logical place for any

[44] Evidence that the retaliation was occasioned not by Nelson's "whistleblowing" but by his false credentials would not detract from any limited obligation of ordinary care on the Hospital and Saudi Arabia.

such warning to have occurred."[45] (Pet. Br. at 44) Even accepting this logic, the negligence claims retain their substantial contact with the United States. As discussed *supra* at 41-43, clause 1 of section 1605(a)(2) does not limit the commercial activity upon which such claims are based to acts or omissions in this country. It requires, by its literal terms, only that they have substantial contact here. Given the intimate connection between the United States and the employment relationship out of which the Hospital's duty of care to prevent Nelson's injury and to warn of danger arises, the commercial activity upon which his negligence claim is based clearly has "substantial contact" with the United States.

Even assuming, however, that the relevant commercial activity must itself occur in the United States, Petitioners are wrong in their assertion that their duties to Nelson arose *after* he left for Saudi Arabia and that breach of such duties could only have occurred there. The Hospital could and should have warned Nelson of the dangers associated with employment before he signed his contract, and it certainly had a duty to do so no later than the point in time at which he had become obligated under that agreement.[46] The contract was executed by Nelson in the United States well before he attended the Hospital employee "orientation" program or departed for Saudi Arabia. The Hospital's duty to warn therefore arose in the United States, and its breach of that duty provides the substantial contact with the United States required for jurisdiction under clause 1 of section 1605(a)(2).

[45] This "logic" appears to be compelled principally by the fact that Petitioners' own "Saudi Arabian advocate" has opined that "Saudi Arabian law does not impose a duty on a recruiter or employer of labour to warn employees of any such hazard" and "an employer will not be liable for failure to warn the employee of such hazards as are alleged by [Nelson], either in advance of his employment or during the same." (J.A. 68)

[46] W. PAGE KEETON, PROSSER AND KEETON ON TORTS 380 (1984) (common law duties arise at creation of master/servant relationship).

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed and the case remanded for further proceedings.

Respectfully submitted,

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STATUTORY APPENDIX

1. Section 1602 of the Foreign Sovereign Immunities Act provides:

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

2. Section 1603(a) of the Foreign Sovereign Immunities Act provides:

> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

3. Section 1603(b) of the Foreign Sovereign Immunities Act provides:

> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision, thereof, or a majority of whose shares or other ownership interest is

owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

4. Section 1603(d) of the Foreign Sovereign Immunities Act provides:

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

5. Section 1603(e) of the Foreign Sovereign Immunities Act provides:

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

6. Section 1605 of the Foreign Sovereign Immunities Act provides:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

* * * *

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity

of the foreign state elsewhere and that act causes a direct effect in the United States;

* * * *

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

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